World of work: Employment and labor law highlights in 2023 – United States

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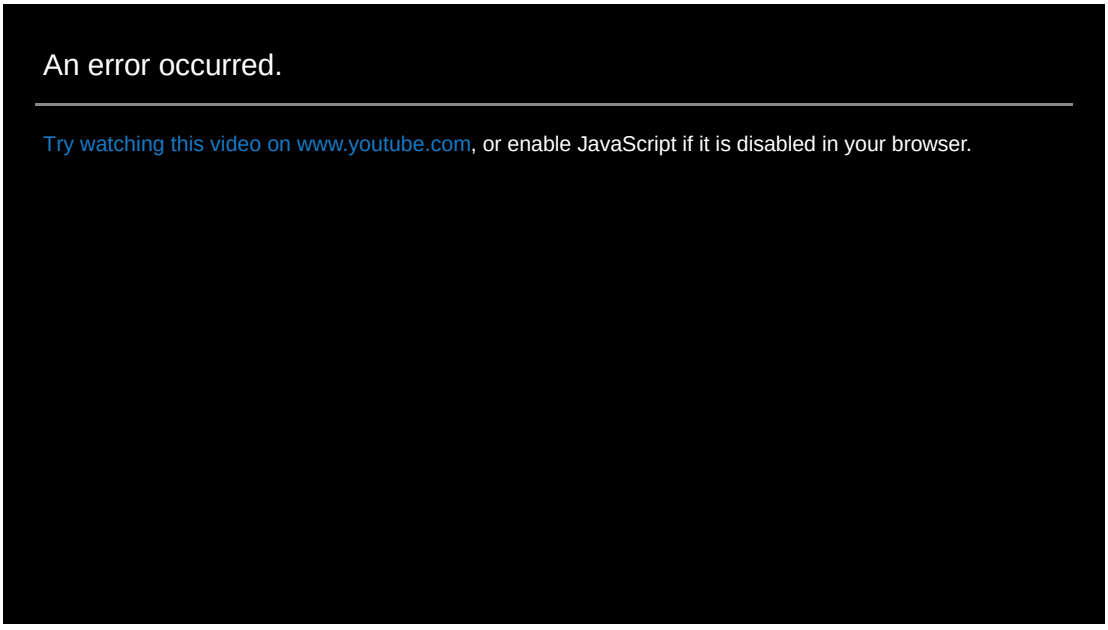
In this episode, we focus on the United States, where Toronto Employment and Labor partner **Meaghen Russell** speaks with Indianapolis partner **Kate G. Erdel** to review key employment trends in the United States.



Our top five developments so far this year are:

1. Federal issue: Confidentiality and non-disparagement

In the National Labor Relations Board's (NLRB) February 21, 2023, ruling in McLaren Macomb, the Board reversed prior NLRB rulings and made it more difficult for an employer to include two types of provisions commonly found in severance agreements for **non-supervisory employees**. The first type are those that require the employee to keep

the severance agreement and its terms confidential. The second is those that require non-disparagement.

Employers have responded to this ruling by either eliminating these provisions altogether, or adding a line to state that "nothing in this agreement does or is intended to violate an Employee's rights under the *National Labor Relations Act*." Whether or not such a disclaimer is sufficient has not yet been determined.

Q. Does this decision impact how an employer can protect itself from an ex-employee (non-supervisory) sharing its confidential or proprietary information and trade secrets with a competitor?

A: No. The NLRB decision only covers whether employers can restrict an employee from sharing the fact that an agreement has been entered into, or that claims have been released in exchange for compensation. This is because the *National Labor Relations Act*, which is enforced by the NLRB, prohibits employers from engaging in unfair labor practices. Unfair labor practices include actions that do or could interfere with an employee's right to negotiate for terms and conditions of employment.

2. Federal issue: Non-compete

The Federal Trade Commission (FTC) believes that non-compete clauses constitute an unfair method competition that violates the *Federal Trade Commission Act* because they keep workers from freely switching jobs and limit the talent pool. In keeping with this preliminary finding, the FTC proposed a new rule in early 2023 that would make it illegal for an employer to enter or attempt to enter into a non-compete with a worker; maintain a non-compete with a worker; or represent that the worker is subject to a non-compete. The proposed rule would apply to independent contractors and employees alike, **and would require existing non-competes to be rescinded**.

- Non-solicitations and rules about confidential information and trade secrets are not expected to be impacted;
- The proposed rule would supersede state laws on non-competes and would not apply to a person who is selling a business;
- The FTC provided an opportunity for public comment on the proposed rule. Comments were due April 19, 2023; and:
- The FTC is expected to vote on the proposed rule in April 2024, but many employers have already started considering the potential change and removing non-competes from their agreements.

Q: Would this apply only to non-competes in employment agreements, or more broadly to any type of document that includes a non-compete – such as an incentive compensation plan?

A: This would likely apply to non-competes found in any kind of agreement, including an incentive compensation plan, an employee handbook that purports to be binding or a stand-alone agreement.

3. Federal issue: *Pregnant Workers Fairness Act*

The *Pregnant Workers Fairness Act* (PWFA) went into effect on June 27, 2023. The Act is a part of Title VII of the *Civil Rights Act* of 1964 and it requires covered employers to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth and related medical conditions, unless the accommodation will cause the employer an undue hardship.

Under Title VII, specifically the *Pregnancy Discrimination Act*, employers were already prohibited from discriminating against a worker on the basis of pregnancy, childbirth or related medical conditions.

Q. Practically, what has changed/what does this look like in practice? Do employers need to amend their policies to reflect this change?

A: Practically, not much has changed because a pregnant worker who requires an accommodation due to pregnancy, childbirth or a related condition likely would have already been protected and entitled to an accommodation under the *Americans with Disabilities Act*. That said, employers do need to be more mindful and should amend their policies to ensure that employees are specifically aware that they may be entitled to an accommodation for a pregnancy-related reason.

4. State trend: Pay transparency

A growing number of states – eight so far – and a number of local jurisdictions, have enacted pay transparency laws. An additional 16 states, and Washington, DC, are considering pay transparency legislation in 2023.

The details of these laws vary from location to location, but generally require that employers include the pay or salary ranges with their job postings, or at the very least, provide the pay range to an applicant who asks for it.

5. State trend: Paid sick and family leave

Prior to the pandemic, most family and medical leave entitlements for employees did not have to be paid (though employers could provide paid leave if they wanted to).

There is no federal law requiring paid sick leave, but a growing number of states (currently over 15 of them) and local jurisdictions have enacted laws that require certain employers to provide paid leave.

Q. Does this change require an employer to update their sick leave policies?

A. In many cases yes, written policies will need to be reviewed and updated to ensure compliance with the new laws. Employers can be more generous in their leave provisions and, for at least some employers, their existing paid time off policies may be sufficient to provide employees with the leave that is now statutorily required. But, even when that is the case, internal payroll and record-keeping procedures should be updated to ensure that compliance can be demonstrated. This is definitely an area for employers to keep an eye on!

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